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# Hong Kong's Basic Law: The Path to 1997, Paved with Pitfalls

By ANNA M. HAN\*

## I. INTRODUCTION

The adoption of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress of the People's Republic of China on April 4, 1990 signals the end of one era and the beginning of another.<sup>1</sup> The declaration announces to the world that after 1997 Hong Kong will revert back to the Chinese, thus ending more than one hundred years of British colonial rule. To the people of Hong Kong,<sup>2</sup> the Basic Law symbolizes the beginning of a new life. After 1997, and perhaps even before, their lives will be governed by a regime with a social, political, and economic system that is alien to some citizens yet familiar to others who escaped a similar system by fleeing to Hong Kong. Between the people of Hong Kong and their new rulers stands a document, the Basic Law. The actual wording of the Basic Law, its interpretation, and perhaps most importantly, the Hong Kong people's perception of it, will affect how Hong Kong will be administered after 1997, and will de-

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1. BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (1990) (effective July 1, 1997) [hereinafter BASIC LAW].

2. Any reference to the "people of Hong Kong" should include the numerous Americans, Canadians, Filipinos, British, and other nationals who reside in Hong Kong. However, in this Article, the term primarily refers to ethnic Chinese living in Hong Kong who do not hold passports which would allow them to leave Hong Kong and take up residence elsewhere. Many Hong Kong Chinese hold British passports which do not grant them a right of abode in the United Kingdom; others hold Chinese passports, and still others, mainly refugees from China, hold a Certificate of Identification. Hong Kong residents who are not ethnic Chinese also may face problems of residence in Hong Kong after 1997. For example, many Indian and Pakistani nationals born in Hong Kong may lose their right of abode in Hong Kong due to their nationality. For a detailed discussion of this issue, see W.S. Clark, *The Legal Status of Canadian and Other Foreign Nationalists in Hong Kong after 1992*, in LEGAL FORUM ON NATIONALITY, PASSPORTS & 1997 9 (J. Arthur McInnis ed.).

termine if the conditions necessary to maintain Hong Kong's social and economic system will survive.

This Article will discuss the history of Hong Kong through the adoption of the Basic Law and will analyze select provisions contained within the Basic Law that may cause the people of Hong Kong to lose confidence in it. Finally, this Article will discuss the viability of the unique proposal contained in the Basic Law, that of "One Country, Two Systems."

Undoubtedly, China is eager to exercise its sovereign powers over Hong Kong. It is likely that the exercise of this power will be paternalistic. As China tries to dictate what is good for Hong Kong, it may actually end up destroying the very characteristics which make Hong Kong a successful, thriving territory and thereby negate the benefits China would receive from the return of Hong Kong. This Article suggests that to the extent possible, China should refrain from interfering with the internal workings of Hong Kong and allow the territory to continue to function and thrive as it has for many years. This is not to suggest that China should not guide Hong Kong, but rather that the guidance should take the form of suggestions and not coercion.

## II. HISTORICAL BACKGROUND

The territory which is commonly referred to as Hong Kong consists of three separate territories granted to the British under three separate arrangements. First, the island of Hong Kong was annexed to the British after the Opium War under the Treaty of Nanking in 1842.<sup>3</sup> The second of such arrangements, the Convention of Peking of 1860, ceded Kowloon to the British.<sup>4</sup> Third, in 1898, an area adjoining both Kowloon and China, known as the "New Territories," was leased to the British under a separate agreement.<sup>5</sup>

Successive Chinese governments have always maintained that Hong Kong, Kowloon, and the New Territories belonged to China. In 1919, the Republic of China demanded the return of Hong Kong and other territories during the Paris Peace Conference without success. The People's Republic of China (PRC) has consistently maintained that these treaties are "unequal treaties," and therefore China is not bound by their

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3. Treaty of Nanking, Aug. 29, 1842, China-Gr. Brit., 50 British and Foreign State Papers 389 [hereinafter Treaty of Nanking].

4. Convention of Peking, Oct. 24, 1860, China-Gr. Brit., art. VI, 50 British and Foreign State Papers 10 [hereinafter Convention of Peking].

5. Convention for the Extension of the Hong Kong Territory, June 9, 1898, China-Gr. Brit., para. 1, 50 British and Foreign State Papers 17 [hereinafter 1898 Convention].

terms.<sup>6</sup> However, no serious attempts to regain these territories were ever made. On the other hand, any attempt to detract from China's claim of sovereignty over Hong Kong was always vehemently opposed by the Chinese government.<sup>7</sup> For example, in 1964, the Soviet-sponsored World Youth Forum adopted a resolution placing Hong Kong and Macao on a par with Timor Island, Papua, Oman, Aden, and South Arabia and demanded "independence" for these places in accordance with the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and People. The PRC delegates strongly protested the adoption of such a resolution.<sup>8</sup> In 1972, the Chinese delegate to the U.N. Committee on Recolonization again declared that matters relating to Hong Kong and Macao were "entirely within China's sovereign right."<sup>9</sup>

Despite the PRC's consistent assertion that the territories of Hong Kong, Kowloon, and the New Territories belonged to China, the government during the 1960s and 1970s was strangely silent on when and how it would reassert sovereignty. The internal politics and the havoc caused by the Cultural Revolution<sup>10</sup> prevented China from focusing specifically on the issue of Hong Kong. During the Cultural Revolution, Hong Kong served as a pipeline for foreign goods and international news to the mainland. It was not until after the end of the Cultural Revolution, when the PRC began normalization of relations with many western nations,<sup>11</sup> that it was prepared to discuss the issue of Hong Kong again.

In the fall of 1982, the British and Chinese jointly issued a commu-

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6. For a discussion of these treaties, see, e.g., PETER WESLEY-SMITH, *UNEQUAL TREATY 1898-1997* (1980).

7. See, e.g., Hungdah Chiu, *Introduction to 20 CASE W. RES. J. INT'L L.* 1 (1988).

8. *Id.* at 3.

9. See Letter from Chinese delegate, Huang Hua, to the U.N. General Assembly Special Committee on Colonialism (Mar. 10, 1972), *reprinted in id.* at 3-4.

10. The term "Cultural Revolution" refers to a period in China's history which began in the early 1960s and did not end until the early 1970s. During the early 1960s, China's economic policies, implemented in the 1950s, failed and significant unrest over the future of the country under Mao Zedong's leadership began.

Some leaders within the Chinese Communist Party began to oppose the policies of Mao, and sought a new approach for development in China. In an effort to keep his leadership intact, Mao initiated the "Cultural Revolution" with the help of the People's Liberation Army and the students of China. The citizens were asked to help purge the Communist Party of members who were against the revolutionary goals of Mao.

The "revolution," in short, was a disaster. Due to widespread turmoil the Communist Party lost much of its leadership, industrial and agricultural production faltered tremendously, and education came to a halt for over a decade.

11. The most notable of which were the United States, Japan, West Germany, Spain, and Australia; others followed. See generally IMMANUEL C.Y. HSU, *THE RISE OF MODERN CHINA* (1990).

nique announcing that both countries agreed to "enter into talks relating to Hong Kong."<sup>12</sup> On December 19, 1984, after two years of extensive negotiations, the United Kingdom and the PRC signed the "Joint Declaration on the Question of Hong Kong."<sup>13</sup> The Joint Declaration announces that after 1997, Hong Kong will become a Special Administrative Region of the PRC.<sup>14</sup> Hong Kong will enjoy a "high degree of autonomy"<sup>15</sup> and its social and economic system will be maintained for fifty years after 1997.<sup>16</sup>

Subsequent to the Joint Declaration, the Mainland and Hong Kong directed efforts toward the drafting of the Basic Law promised in the Joint Declaration. The drafting process of the Basic Law was controversial at best.<sup>17</sup> In 1985, the Basic Law Drafting Committee was formed to begin the arduous task of setting down on paper rules which would govern the political, legislative, religious, educational, economic, legal, and social aspects of Hong Kong for fifty years. Twenty-three of the fifty-nine members of the Basic Law Drafting Committee were from Hong Kong, with the rest from China. The majority of the Hong Kong members were appointed by the PRC. While all of the members of the Basic Law Consultations Committee were Hong Kong residents, all were selected by the PRC government.

The Basic Law was promulgated in 1990, near the anniversary of the incident of June 4 at Tiananmen Square. This, coupled with the fact that the version of the Basic Law passed contained many provisions that were objected to by the Hong Kong members of the Basic Law Drafting

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12. For further details regarding the conference between then Prime Minister Margaret Thatcher of Great Britain, Deng Xiaoping, and former Premier Zhao Ziyang of the PRC, see, e.g., Philip Bowring et al., *Still on Borrowed Time*, FAR E. ECON. REV., Oct. 1, 1982, at 10.

13. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Sept. 26, 1984 [hereinafter Joint Declaration].

14. *Id.* par. 3(1).

15. *Id.* par. 3(2).

16. *Id.* Annex I. The actual wording is "Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years." More recently, during a visit in 1992, Deng Xiaoping has stated that the system of Hong Kong would remain unchanged for "at least" fifty years. This announcement, coupled with Deng's praises of the economy of Southern China created an atmosphere of optimism and sent Hong Kong stock prices upward.

17. For a detailed discussion of the drafting process and how it undermined the confidences of the people of Hong Kong, see Ming K. Chan, *Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90*, in HONG KONG BASIC LAW: BLUEPRINT FOR STABILITY AND PROSPERITY UNDER CHINESE SOVEREIGNTY 3 (Ming K. Chan & David J. Clark eds., 1991) and Johannes Chan, *Protection of Civil Liberties and Emily Lau, The Kowtow Constitution*, FAR E. ECON. REV., Jan. 26, 1989, at 10.

For discussion of the drafting process from the Chinese perspective, see LI TSAN DAO & KUNG XIAO HAN, *Ji Ban Tousei [THE BASIC LAW]* 38 (China Book Bureau Co., 1990).

Committee,<sup>18</sup> caused significant unrest among the people of Hong Kong. Subsequent actions by the PRC's government have not bolstered the confidence of the people of Hong Kong in a future which the Joint Declaration has guaranteed to be characterized by a "high degree of autonomy."<sup>19</sup> Examples of PRC interference in Hong Kong affairs prior to 1997 are reflected in Beijing's continuing obstruction of the new Hong Kong airport (due to be completed prior to 1997 at a cost of sixteen billion dollars) and comments made by Chinese official Guo Fengmin on June 18, 1992, that China would not accept appointment of liberal Martin Lee to Hong Kong's executive council. Guo also accused supporters of democracy of "subverting" the interest of China in his statement after a meeting of the Sino-British Joint Liaison Group.

More recently, China has threatened to disavow contracts entered into by Hong Kong which it has not specifically approved.<sup>20</sup> These threats are aimed at Hong Kong Governor Chris Patten's efforts to broaden the election base for legislative council seats before 1997. One specific threat was directed at a 1.2 billion Hong Kong dollar contract for a container terminal in Hong Kong. This threat so shook Hong Kong people's confidence that it sent the stock market tumbling.<sup>21</sup>

### III. TROUBLING ISSUES IN THE BASIC LAW

During the drafting of the Basic Law and after its promulgation by the PRC, a number of legal scholars and members of Hong Kong society objected that many provisions of the Basic Law contravened the spirit, if not the letter, of the Joint Declaration.<sup>22</sup> Certainly a number of provi-

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18. See, e.g., Emily Lau, *Voice of the People*, FAR E. ECON. REV., June 8, 1989, at 18. One such provision is the rejection of the various Hong Kong suggested models of the post-1997 legislative composition in Annex II of the Basic Law. Of particular concern is the number of directly elected members of the Hong Kong legislature in 1997. While Hong Kong sponsored models suggested numbers ranging from 25% to 50% of the seats in the legislature being directly elected by the people, the Basic Law allows for only 18 seats out of a total of 60 to be elected directly to the Legislative Council by 1991 and 20 seats by 1995. This number will be increased until it reaches 30 by the year 2003. Subsequent elections are open to amendment by two thirds of the members of the Legislative Council and the consent of the Chief Executive.

19. For a discussion of the fight to pass a Bill of Rights in Hong Kong before the 1997 turnover date, see, e.g., Emily Lau, *Better Late Than Never*, FAR E. ECON. REV., July 12, 1990, at 16 and Jim Mann, *Will Hong Kong Swallow China? Not if Facts Count*, L. A. TIMES, July 12, 1992, at M2.

20. Gene Linn, *Stock Market is Casualty in War of Words*, UPI, Dec. 20, 1992, available in LEXIS, Nexis Library, UPI File.

21. *Id.*

22. See, e.g., Yash Ghai, *The Past and the Future of Hong Kong's Constitution*, Address from the University of Hong Kong's Sir Y.K. Pao Chair of Public Law (Mar. 4, 1991), in 38

sions, if interpreted and applied strictly, could undermine the autonomy of Hong Kong and the welfare of its people.

### A. Veto Power Under Article 17

In China, unlike common law countries, review of the constitutionality of legislation does not reside in the courts. Instead, the Standing Committee of the National People's Congress (NPC) is empowered to interpret the constitutionality of PRC laws.<sup>23</sup> As the ultimate authority on constitutionality within China, the Standing Committee is also the ultimate authority on the constitutionality of Hong Kong legislation. There is nothing within the PRC constitutional structure which would prevent the Standing Committee of the NPC to declare any Hong Kong legislation unconstitutional under the PRC's Constitution even though it may be consistent with the Basic Law. While the Basic Law is intended, by its completeness, to serve as a guide for almost every aspect of Hong Kong society, it is, to the PRC, only one piece of legislation which must fit within the overall legal framework of China.<sup>24</sup> While some have called the Basic Law Hong Kong's Constitution or referred to it as a "mini-constitution," PRC legal scholars have consistently argued that the Basic Law does not have constitutional status and is no different than any other PRC domestic legislation.<sup>25</sup> Under Article 17 of the Basic Law, the Standing Committee of the NPC is specifically given the power to return any Hong Kong legislation to the Legislature of Hong Kong Special Administrative Region (SAR) for reconsideration or to revoke such legislation.<sup>26</sup> While the Standing Committee of the NPC is not em-

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Univ. of Hong Kong, Supplement to the Gazette (May 6, 1991); *Hearing to Examine U.S. Policy toward the People's Republic of China (PRC) in light of PRC Government Suppression of April-June, 1989 Pro-democracy Movements in the PRC*, 101st Cong., 2nd Sess. (1990) (statement of Martin Chu-ming Lee, member of the Hong Kong Legislative Council); Nihal Jayawickrama, *Economic, Social, and Cultural Aspects*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 231-47 (Peter Wesley-Smith & Albert H.Y. Chen eds., 1988).

23. P.R.C. CONST. art. 67 (1983).

24. The closest analogy on the status of the Basic Law within the legal framework of the United States would be to envision a scenario where Guam or Puerto Rico became a state and the Federal government undertook the task of drafting the entire state constitution without input from the people of the affected territory. This "state constitution" would be subordinate to the U.S. Constitution, and the local rules and regulations of the territory would need to comply with both the state and federal constitutions. In addition, the power to amend or interpret this "state constitution" would reside with the federal government.

25. See, e.g., LI TSAN DAO & KUNG XIAO HAN, *supra* note 17, at 63 n.12; Zhang You Yu, *The Reasons for and Basic Principles on Formulating the Hong Kong Special Administrative Region's Basic Law, and Its Essential Contents and Mode of Expression*, 2 J. CHIN. L. 7 (1988).

26. BASIC LAW, art. 17.

powered to directly amend Hong Kong legislation, this single limitation is meaningless in light of the veto power granted under Article 17.

After 1997, when Hong Kong becomes a Special Administrative Region of the PRC, the Basic Law, as well as any future Hong Kong legislation, will be subordinate to the PRC Constitution. While the Joint Declaration may provide some international guarantee, its binding powers are only as strong as Britain's willingness to enforce its rights on behalf of the people of Hong Kong.<sup>27</sup> Despite recommendations by members of the Basic Law Drafting Committee that the ultimate authority for interpretation of Hong Kong legislation should remain in Hong Kong with a body such as the Court of Final Appeals, the government of China is clearly not willing to relinquish such powers to the people of Hong Kong.

There is very little guidance within the Basic Law on how Hong Kong legislation after 1997 should be judged. Although Article 11 of the Basic Law explicitly states that no law of the Hong Kong SAR shall be contrary to the Basic Law,<sup>28</sup> the Basic Law neglects to address the possibility that a Hong Kong law could be consistent with the Basic Law but inconsistent with the PRC Constitution. When imagining the future of Hong Kong, one can see many possible situations where the legislation of Hong Kong, while consistent with the principles of the Basic Law, would be unconstitutional under PRC law. Already, certain provisions of the Basic Law and the PRC constitution are inconsistent. The Basic Law's provisions on birth control, military service, and a common law legal system are in direct conflict with the PRC constitution.<sup>29</sup> Although the Basic Law is explicit in allowing Hong Kong to maintain its present

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27. Questions have already been raised about the legal effects of the Joint Declaration. On Aug. 1, 1984, the British announced that an "agreement" would be reached between Britain and China. On the same day, the Chinese announced a "joint declaration" would be made. China's reluctance to apply words such as agreement, convention, or treaty to the Joint Declaration has been the subject of articles questioning the legal effects of the Joint Declaration. *See, e.g.,* HUANG BING KUAN, *YI GUO LIANG ZHI [ONE COUNTRY, TWO SYSTEMS]* 8 (1989).

28. BASIC LAW art. 11.

29. In regard to birth control, the P.R.C.'s Constitution states that, "Both the husband and the wife have the duty to practice family planning." P.R.C. CONST. art. 49. Furthermore, China strictly enforces a "one-child" policy on its nationals. The Basic Law states that, "The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law." BASIC LAW art. 37.

Defending China "is the honourable duty of citizens," where everyone is required to perform military service. P.R.C. CONST. art. 55. In Hong Kong however, there is no such duty imposed on the people.

Finally, the common law legal system will still be adhered to in Hong Kong according to Article 8 of the Basic Law, but the P.R.C. has followed a "socialist legal system" since 1949. *See* P.R.C. CONST. art. 5.



political and economic systems, the veto power placed in the hands of the NPC by Article 17 detracts from Hong Kong's ability to do so.

## B. National Laws Under Article 18

The National People's Congress of the People's Republic of China can enact and apply its laws to Hong Kong pursuant to Article 18 of the Basic Law.<sup>30</sup> Nothing in the Basic Law requires that these new laws be consistent with the principles expressed in the Joint Declaration. The only requirement is that the NPC "consult" with the Hong Kong SAR prior to the enactment of these laws.<sup>31</sup> Absent special constitutional protection, the Basic Law is like any other legislation in China. Theoretically, new laws and rules enacted by the PRC, with specific application to Hong Kong, can easily supersede provisions of the Basic Law. At present, nothing within the PRC's legal structure requires that its internal laws be consistent. In addition, no principles of regional conflicts of law exist to resolve these problems.

While Article 18 states that PRC national laws shall not apply to Hong Kong except for specific laws added to the Basic Law in Appendix 3,<sup>32</sup> it also provides that the Standing Committee of the NPC may add or delete from the list of laws in appendix 3 after consultation with the Hong Kong regional government.<sup>33</sup> While these national laws, applicable to Hong Kong, should theoretically relate only to defense, foreign affairs, or other matters which involve the exercise of sovereignty, these limitations are suspended if the Standing Committee of the NPC decides a state of war or other conditions "by the reason of turmoil" exist within

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30. BASIC LAW art. 18.

31. *Id.*

32. Appendix 3 of the BASIC LAW reads:

The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region:

1. Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China.
2. Resolution on the National Day of the People's Republic of China.
3. Order on the National Emblem of the People's Republic of China Proclaimed by the Central People's Government. Attached: Design of the national emblem, notes of explanation and instructions for use.
4. Declaration of the Government of the People's Republic of China on the Territorial Sea.
5. National Law of the People's Republic of China.
6. Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities.

33. BASIC LAW art. 18.

the Hong Kong SAR.<sup>34</sup> In that event, the Central People's Government is free to issue any type of order and apply any of its national laws to Hong Kong.<sup>35</sup> This provision should be particularly troublesome to the people of Hong Kong as the PRC's definition of "national unity or security" is broadly defined. In the Chinese text of the Basic Law, the term used for turmoil, "Dong Luan," is exactly the same term used by the PRC government when referring to the events of June 4, 1989, at Tiananmen Square.<sup>36</sup> That being the case, student protests or consumer boycotts could all easily fall under the category of "turmoil within Hong Kong," thereby invoking the Central Government's emergency powers.<sup>37</sup> The Basic Law does not provide that the laws applied during such period of emergency shall be lifted after the expiration of the emergency. Thus, the PRC can use the excuse of any "unrest" within Hong Kong to impose its national laws on Hong Kong in perpetuity under Article 18.

### C. Jurisdiction Under Article 19

The power of the Hong Kong judiciary to review Hong Kong legislation is extremely limited under Article 19. Article 19 allows the Chief Executive, acting on behalf of the People's government, to restrict the court's jurisdiction. This is contrary to most common law concepts of jurisdiction under which a court is generally given the power to determine its own jurisdiction. Here, however, the Basic Law allows the Executive branch to determine a Hong Kong court's jurisdiction.<sup>38</sup> In addition, "acts of state *such as* defense and foreign affairs," are excluded from any Hong Kong court's jurisdiction.<sup>39</sup> This exclusionary clause of Article 19 is drafted in such a way as to indicate that defense and foreign affairs are clearly intended to be only examples of matters where a Hong Kong court's jurisdiction may be limited. Other subject matters may later be removed from its jurisdiction by the PRC government. For example, judicial review of the legality of activities by the PRC government representatives in Hong Kong, including criminal activities, could easily be interpreted as being outside of a Hong Kong court's jurisdiction.

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34. *Id.*

35. *Id.*

36. The Chinese term "Dong Luan" in Article 18 is used consistently by the official press of the PRC to describe the student demonstrations during May and June of 1989.

37. China has even threatened to take over the Hong Kong military before 1997 should "turmoil" or "riot" merit such action. *Journal Says China Politically and Militarily Prepared to Take Hong Kong Early*, BBC Summary of World Broadcasts, Dec. 4, 1992, available in LEXIS, World Library, BBCSWB File.

38. BASIC LAW art. 19.

39. *Id.* (emphasis added).

Furthermore, the Basic Law does not define the terms "foreign affairs" or "defense matters." Currently, Hong Kong courts do not have the power to adjudicate the legality of certain matters which are acts of the sovereign exercising its prerogative powers. For example, the courts of Hong Kong may not adjudicate the legality of the appointment of the Governor or any public officials, nor determine the limits of the power of the Governor to pardon or remit a sentenced defendant. Similarly, matters of foreign relations such as a declaration of war, or the signing or performance of a treaty are not within any court's jurisdiction. Presently, however, a Hong Kong court is the deciding body on whether a matter involves external affairs or is an exercise of prerogative power and whether the matter is within its jurisdiction. Article 18 takes away that power from the courts of Hong Kong after 1997. Coupled with Article 158 which gives the power of interpretation of the Basic Law to the Standing Committee of the NPC,<sup>40</sup> Article 19 in essence allows the NPC to decide what is and is not within a Hong Kong court's jurisdiction.

Given the PRC's attitude regarding what it considers to be internal affairs and what it considers to be foreign affairs, it is possible to envision situations where freedom of the press or freedom of speech, normally considered internal domestic matters, could be interpreted as involving foreign affairs and defense if these activities should advocate actions against the PRC government. While stating that the Hong Kong SAR shall enjoy independent judicial powers, Article 19 nevertheless clearly puts great limits on the exercise of these powers.

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40. BASIC LAW art. 158 reads:

The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgements on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgements previously rendered shall not be affected. The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

The PRC government has also made a distinction between a Hong Kong court's ability to adjudicate a case and its ability to interpret the law.<sup>41</sup> Article 19 is specific in limiting the judicial power to independent adjudication.<sup>42</sup> Since the most likely area for this issue to arise is where action and speech by a Hong Kong resident within Hong Kong is deemed to affect national security or defense matters, one must look at the article which purports to give the freedoms of speech and press to the Hong Kong people.<sup>43</sup> Despite the statement in the Joint Declaration which continues the application of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights to Hong Kong,<sup>44</sup> the handling of the student demonstrations in Beijing in May and June of 1989 did not increase the confidence of the people of Hong Kong regarding how much freedom they will enjoy after 1997 with the Basic Law their only source of that guarantee.<sup>45</sup>

It is precisely due to these concerns that Hong Kong passed the Hong Kong Bill of Rights Ordinance of 1990 (Bill of Rights)<sup>46</sup> on June 5, 1991. The ordinance is modeled after the Universal Declaration of Human Rights adopted by the United Nations. It contains provisions which protect the people of Hong Kong from torture, slavery, and servitude, as well as give them the right to a fair and public hearing, the right of privacy, the right to freedom of expression, the right to freedom of

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41. *Id.* para. 3. Adjudication relates to the application of the laws to the facts of the case in order to dispose of it. It does not, however, include the power of interpretation of the laws. Under art. 19, Hong Kong SAR courts will have the power to interpret the existing law if the matter is domestic. However, if the outcome of a case before a Hong Kong court depends on the interpretation of those provisions of the Basic Law which concern the responsibilities of the Central People's Government or the relationship between the PRC and Hong Kong, the matter must be referred to the Standing Committee for its interpretation. Given this restriction, almost anything can be said to have an impact on the relationship between China and Hong Kong. See Yash Ghai, *Constitutional Law*, in *ANNUAL SURVEY OF THE LAW 1990-1991* 181, 190 (Judith Sihombing ed., 1992).

42. BASIC LAW art. 19.

43. *Id.* art. 27. The Article states:

Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.

44. See Joint Declaration annex I, art. 13.

45. Article 35 of the PRC Constitution is similar to Article 27 of the Basic Law. Therefore, it cannot serve as a source of additional comfort. Article 35 of the PRC Constitution states: "Citizens of the [PRC] enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." Article 35 is even less forceful in conveying a sense of a vested right on the people.

46. Hong Kong Bill of Rights Ordinance of 1991, Ordinance No. 59 of 1991 (Hong Kong, Government Printing Office, 1991).

religion, the right to peaceful assembly, and the right to freedom of association.<sup>47</sup> The passage of the Bill of Rights on the heels of the Basic Law is an indication of the lack of confidence that the people of Hong Kong have in their future.<sup>48</sup>

China has already objected to the passage of the Bill of Rights, and there is fear that the ordinance may be rescinded by China after 1997.<sup>49</sup> Despite the assurance of Article 18 that all existing Hong Kong laws shall remain in effect after 1997, the viability of the Bill of Rights after that time remains in doubt.

#### D. Treason and Sedition Under Article 23

Perhaps the most telling article of the Basic Law in terms of the PRC's attitude toward Hong Kong is Article 23.<sup>50</sup> The article is particularly alarming to the people of Hong Kong who are concerned about China's notion of political freedom. The prior drafts, completed before the events of June 1989, were much different in tone and specificity.<sup>51</sup> The final version of Article 23 should alarm anyone familiar with China's broad and flexible definition of treason, secession, sedition, subversion, and state secrets.

Article 23's very existence not only prohibits such "acts" from taking place after 1997, it also has a chilling effect on speech and activities before 1997. Anyone presently advocating that Hong Kong's future does not lie with China or who is involved in an organization which may not

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47. *Id.* arts. 3-4, 10, 14-18.

48. See John Elliott, *Watered-down Bill of Rights approved*, FIN. TIMES, June 6, 1991, § 1, at 4.

49. See generally *id.*

50. Article 23 of the Basic Law reads:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

51. The April 1988 draft of Article 23 for solicitation of opinion by the Hong Kong people stated:

The Hong Special Administrative Region shall prohibit by law any act designed to undermine national unity or subvert the Central People's Government.

The February 1989 draft stated:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition or theft of state secrets.

See Secretariat of the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Reference Papers for the Basic Law of the Hong Kong Administrative Region of the People's Republic of China 22-23 (Feb., 1989).

support the Chinese regime (as many people of Hong Kong were during and shortly after the Tiananmen incident) could be charged under the "laws enacted" pursuant to Article 23.<sup>52</sup> Article 23 appears to be directed at possible associations between pro-democracy organizations in Hong Kong and China. China has already declared that organizations such as the Alliance in Support of the Patriotic Democratic Movement in China will not be allowed to exist after 1997. Additionally, China has been extremely critical of outspoken individuals, such as Martin Lee and Szeto Wah, who have not approved of Chinese policy toward Hong Kong. There have been rumors as well that the PRC has already published a "blacklist" which includes influential citizens of Hong Kong.<sup>53</sup>

An even more interesting question is whether Article 23 will be used to prohibit associations between organizations or movements in Hong Kong and Taiwan. Since the language of the article prohibits "ties with *foreign* political organization,"<sup>54</sup> it could be argued that such associations with Taiwan should be allowed given that the PRC still claims Taiwan as a province of China.

## E. Economic Provisions

The Basic Law contains a number of provisions intended to ensure the continuation of a market system in Hong Kong. One example is Article 106, which specifies that revenues generated in Hong Kong will remain in Hong Kong and that the PRC government will not levy taxes in Hong Kong.<sup>55</sup> Article 110 provides for independent formulation of monetary and financial policies by the Hong Kong SAR,<sup>56</sup> while Article 111 provides that the Hong Kong dollar will remain convertible and be backed by a 100% reserve fund.<sup>57</sup> Furthermore, Article 112 provides that no foreign exchange control policies will be applied in Hong Kong.<sup>58</sup> Article 114 provides for maintenance of Hong Kong as a free port,<sup>59</sup> and Article 115 provides for the maintenance of the free trade policies in

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52. Xinhua News Agency, PRC's unofficial representative in Hong Kong, has been accused of applying pressure on Hong Kong journalists who are critical of Chinese authorities. William Shawcross, *Colony's Press Harassed to Please Chinese*, THE TIMES, Jan. 22, 1993.

53. See *Reports of PRC "Blacklist" Denied*, BBC Summary of World Broadcasts, Mar. 31, 1992, available in LEXIS, World Library, BBCSWB File.

54. BASIC LAW art. 23 (emphasis added).

55. *Id.* art. 106.

56. *Id.* art. 110.

57. *Id.* art. 111.

58. *Id.* art. 112.

59. *Id.* art. 114.

### Hong Kong.<sup>60</sup>

These articles seem to indicate that Hong Kong should continue to function and thrive as it currently does. However, many of these provisions tend to be self-serving and others tend to straight-jacket the Hong Kong government's formulation of its economic and financial policies. For example, Article 107 requires that Hong Kong's budget be in balance,<sup>61</sup> meaning that expenditures must not exceed revenues, and Article 108 requires that the Hong Kong SAR continue its low tax policies.<sup>62</sup> Since part of Hong Kong's success is attributed to the ability of the people and the government to adapt to differing situations, the requirements that budgets be balanced and low taxes be maintained may in fact hamper the government's ability to react to extraordinary circumstances or to engage in long range planning.<sup>63</sup>

No law can dictate, as Article 109 of the Basic Law purports to do, that a particular area remain an "international financial center."<sup>64</sup> As long as the interpretation and application of the Basic Law are in the hands of the PRC, the economic prosperity of Hong Kong will remain in doubt. Economic prosperity is not prescribed by law, but rather is created by its contributors' perceptions and activities consistent with those perceptions. If the people of Hong Kong and the international community perceive that Hong Kong, after 1997, will continue its free market system and enjoy minimal government interference, then Hong Kong will continue to attract foreign investment and maintain its skilled labor force.<sup>65</sup> However, if the perception of Hong Kong is, despite the wording of the Basic Law, that the PRC government is heavy-handed in its administration, then the continuation of the flight of capital as well as talent will diminish Hong Kong's chances of economic prosperity.<sup>66</sup> No declaration in the Basic Law can guarantee prosperity.

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60. *Id.* art. 115.

61. *Id.* art. 107.

62. *Id.* art. 108.

63. It has been argued by one member of Hong Kong's present Legislative Council, Lydia Dunn, that the Basic Law should set forth principles, not policies. Clearly, this has not been adopted. See Lydia Dunn, *Hong Kong Legislative Debate Council on Draft Basic Law of the Hong Kong Special Administrative Region (July 13-14, 1988)*, in *THE HONG KONG BASIC LAW: BLUEPRINT FOR "STABILITY AND PROSPERITY" UNDER CHINESE SOVEREIGNTY* 92, 92-93 (Ming K. Chan & David J. Clark eds., 1991).

64. BASIC LAW art. 109.

65. It is questionable whether such a perception exists as some 60,000 Hong Kong residents left the colony in 1991, immigrating to countries such as the United States, Canada, Australia, and New Zealand. See generally Liu Qingyan, *Hong Kong stability is aim of Senate Bill*, WASH. TIMES, May 8, 1992, at A9.

66. *Id.*

Since the promulgation of the Basic Law, activities by the PRC government have caused the people of Hong Kong to doubt that the PRC government intends to let Hong Kong enjoy its autonomy. In 1991, the PRC raised doubts by interfering in Hong Kong's decision to build a new Hong Kong airport.<sup>67</sup> The PRC's continuing infusion of capital into Hong Kong through the acquisition of important assets, such as Hong Kong's premier airlines and public utilities, as well as interests in Hong Kong banks, all serve as reminders that the PRC presence in Hong Kong is ever increasing and that PRC control may not wait until 1997.<sup>68</sup> On one hand, these investments bolster confidence because they show the PRC's confidence in Hong Kong's future and the PRC's increased stake in maintaining Hong Kong's prosperity. On the other hand, as more and more key private industries are purchased by PRC interest groups, doubts about the survival of Hong Kong's market economy are raised.<sup>69</sup>

#### IV. ONE COUNTRY, TWO SYSTEMS

The main purpose of the Basic Law is to maintain a "one country, two system" policy. The question raised is whether two such diametrically opposed systems can exist in one country without one influencing or, ultimately, dominating the other to the point that the other no longer exists. China is a socialist country with a highly centralized government. Its labor force has long enjoyed the concept of an "iron rice bowl,"<sup>70</sup> where allocation of human and natural resources has always been dic-

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67. See, e.g., Philip Bowring & Michael Taylor, *Bring on the Reserves*, FAR E. ECON. REV., Apr. 4, 1991, at 46. Chinese diplomats tried to tie an agreement on the airport project to guarantees on the size of Hong Kong's fiscal reserves in 1997. China's objection was based on the high cost of the airport project, the fiscal burden laid upon Hong Kong after 1997 as a result of this high cost, and the fear that the British would use the project to strip Hong Kong of its massive reserves. China has escalated its objection by refusing to allow flights departing from the new airport to enter Chinese air space if China does not approve the airport project. Geographically, this would make the new airport essentially non-functional.

68. See, e.g., Jonathan Friedland, *The Cadres' Bargains*, FAR E. ECON. REV., Jan. 11, 1990, at 34, and Steve Glain, *Mainland Firm Buys Stake in a Hong Kong Terminal*, ASIAN WALL ST. J., Apr. 8, 1992, at 3. The China International Trust & Investment Corporation (CITIC), China's overseas investment arm, has already purchased large stakes in Dragonair, Cathay Pacific Airway, Hong Kong Telecommunications Ltd., and Hong Kong Electric Company. Another recent investment by a Chinese interest is the purchase by China Merchants Holdings Co. of a 15% interest in Modern Terminals Ltd., a large container-terminal operation in Hong Kong, for SUS174 million.

69. See generally Friedland, *supra* note 68, at 34.

70. The phrase "iron rice bowl" refers to a concept equivalent to life long employment. Once a worker is placed in a job, absent some serious misdeed, the person is guaranteed that job until retirement. The practice has recently been criticized as allowing incompetent workers to remain on the job and taking away all incentives for the workers to perform their tasks well.



tated by the government. Since the Communist Party took control of China in 1949, it has determined where people will work, what job or function the individual will perform at his or her work, and what will be produced. The government also decides on production, prices, and distribution of most products.<sup>71</sup>

China's currency, the Renminbi (The People's Currency), is non-convertible. A non-convertible Renminbi means that the currency cannot be used to purchase goods, services, or other currency outside of China. This inability to convert has been an onus to trade activity between China and foreign nations, since China must first obtain foreign currency to buy foreign goods. When the availability of foreign currency is low in China, the nation is incapable of importing much needed technological and manufacturing products and information. In addition, most commodities in China are subject to price controls. The Chinese government puts price-controls on many basic commodities such as rice, oil, meat, and rent to maintain stability in the economy and prevent high inflation. The income level of the average PRC citizen is approximately \$US300 per year.<sup>72</sup>

Hong Kong, on the other hand, has enjoyed a free market system, with minimum interference from its government. This laissez faire, or hands off, policy of the Hong Kong government has included a low tax rate, privatization of most utilities, and minimum business incorporation provisions. Hong Kong's economy is fiercely competitive. Prosperity usually results from merit and hard work. There is significant mobility within the work force, and there is substantial investment by foreign interests such as the U.S. and Japan.<sup>73</sup> Hong Kong's currency is freely convertible and currently tied to the U.S. dollar.<sup>74</sup> Its populace is generally well educated and enjoys an annual income in excess of \$US13,000

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71. While China is experimenting with the market system recently by allowing more private control of certain productions and businesses, the key industries in China remain under tight state planning and control.

72. In May 1991, the per capita income in China was only \$US320 per year. Jill Lettich, *On the Rim of Success; Pacific Rim Countries' Retail Trade Retailing Around the World: Endless Possibilities or Endless Problems*, DISCOUNT STORE NEWS, May 6, 1991, at 82.

73. The Japanese in 1990 invested \$1.26 billion in Hong Kong, while the U.S. currently has invested over \$7 billion. See Monua Janah, *Japan Invests more in Hong Kong*, WALL ST. J., Nov. 29, 1991, at A4 and Simon Holberton, *Beijing Connection*, FIN. TIMES, July 16, 1992, at 28.

74. The Hong Kong currency is called the dollar as well. The conversion rate is pegged to the U.S. dollar at approximately \$HK7.80 to \$US1.00. This pegging in effect keeps the Hong Kong currency relatively stable.

per person.<sup>75</sup>

China has long relied upon Hong Kong as a major source of its foreign exchange earnings, as well as a source of investment and technology. Hong Kong, in turn, relies upon China for its basic needs such as water, food, and electricity. Almost all of Hong Kong's water, fruits, and vegetables are from China and its source of electrical power is a nuclear power plant located just north of the border in Dai Ya Bay.<sup>76</sup> Given the contrasts of the two systems and the high dependence of the two regions, one must question whether they will be able to coexist within one country without influencing the other.

Already, the influence of Hong Kong can be seen just above the boarder in Special Economics Zones such as Shenzhen. Hong Kong television and radio are both readily available, Hong Kong fashion is emulated, and Hong Kong-style capitalism is booming. In contrast to the rest of China, where per capita income is \$US300, the Shenzhen population enjoys per capita earnings of more than twice their counterparts.<sup>77</sup>

Politically, China has long undergone periods of policy fluctuations where liberalization is followed by a period of retrenchment. Like a pendulum, China frequently swings between two extremes. In 1983, after a prolonged period of practicing the "open door policy," a campaign of "spiritual pollution" was initiated, denouncing foreign influence on China.<sup>78</sup> In 1987, another campaign opposing "bourgeois liberalism" was instituted against the growing unrest of students in China pushing for true "democratic" reform.<sup>79</sup> There is no guarantee that once Hong Kong becomes part of China, it will not become the target of these campaigns. In all likelihood, Hong Kong will be held out as an example of liberal excesses and will be the focus of "reform" efforts by the PRC government. By becoming part of China, Hong Kong will no longer be

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75. Per capita income in Hong Kong as of May 1991 was \$13,906 per year. Kevin Rafferty, *China's Grasp and Hong Kong's Golden Eggs*, HARV. BUS. REV., May/June 1991, at 54.

76. See, e.g., Steve Glain and Jesse Wong, *China Draws Hong Kong's Giant Firms*, ASIAN WALL ST. J., May 8, 1992, at 1.

77. Current income estimates for Shenzhen are around \$US800 per capita a year. Ford S. Worthy, *Where Capitalism Thrives in China*, FORTUNE, Mar. 9, 1992, at 71.

78. The campaign originated from an outbreak of movies and artistic works which emphasized the theme of repression and victimization of the Chinese citizens by the People's Liberation Army and the Chinese Communist Party. See JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 688-89 (1990).

79. *Id.* at 724-27. The "Bourgeois Liberalism" campaign was a multi-faceted attack on what the Communist Party perceived as being the ills of the Chinese society caused by an increase of "westernization" and capitalism. The campaign targeted students and intellectuals advocating democracy, entrepreneurs who were living a bourgeois, and therefore decadent, life style, and the rise of economic crimes and prostitution.

able to watch these campaigns on the side lines with concern; it will be in their midst. There is no doubt that these campaigns could damage the economy of Hong Kong. However, the PRC government seldom stops to consider the economic consequences of the campaigns it begins.

China's refusal to consider the economic consequences of its action is exemplified by its disregard of the Hong Kong stock market's reaction to the continuing denunciation of Hong Kong's democratization efforts. China launched a barrage of attacks against the Hong Kong government's efforts to allow more public representation in the election of the Legislative Council members. These attacks caused a drop of over sixteen percent in the Hang Seng index over a period of one month. The drop affected many companies in which China has substantial investments.<sup>80</sup>

Already, Hong Kong's stock market reacts dramatically to every pronouncement by Beijing. When Deng Xiaoping praises the booming economy of Southern China, the market rises.<sup>81</sup> When the Chinese government denounces the airport project or otherwise criticizes Hong Kong, the market reacts negatively.<sup>82</sup> In light of the dramatic social and economic differences which currently exist between Hong Kong and mainland China, one must stop to ponder how this "one country, two systems" concept will be applied. It is possible to conclude that such a scheme might work if the two systems remained isolated and separated from each other in all matters but foreign affairs and expressions of sovereignty.<sup>83</sup> However, the reality is that the two systems are far from isolated; a tremendous amount of interaction exists between Hong Kong and the PRC. In addition to the interaction of information, travel, trade, and investment discussed previously, the Basic Law is designed to re-

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80. Alex Lam, *China Ready to Pay Financial Price in H.K. Battle*, REUTER BUS. REP., Dec. 2, 1992.

81. See Lincoln Kaye, *Deng Speaks Out*, FAR. E. ECON. REV., Feb. 13, 1992, at 10. Deng made a speech warning opponents of economic reform that his "open door" policies presented "the only way out" for China. This speech added to the rumors that Zhao Ziyang would be fully "rehabilitated" into the Communist Party, and caused the Hang Seng Index of Hong Kong to shoot-up 75 points.

82. See, e.g., Lotte Chow, *Hong Kong Share Prices Tumble 1.9%*, ASIAN WALL ST. J., July, 8, 1992, at 11. Hong Kong shares retreated almost 2% during a four-day period in July in response to a deadlock in the Sino-British talks over financing for the colony's multi-billion dollar airport project. The stock market reacted even more dramatically as China attacked Hong Kong's reform efforts, tumbling 1008 points in one day on November 30, 1992, due to news that China may refuse to honor contracts signed before 1997 without its approval. Linn, *supra* note 20.

83. Here, foreign affairs refers to matters such as the signing of treaties and declarations of war, and expressions of sovereignty refer to use of national emblem, song, and flag.

quire other interactions. It is in these interactions where problems will arise.

### A. The Hong Kong Legal System

Presently Hong Kong has a common law legal system while China has a socialist legal system which more closely resembles a civil law system. Since the power of final adjudication relating to "external affairs" does not rest in Hong Kong per the Basic Law,<sup>84</sup> litigants in Hong Kong may find themselves seeking relief under an entirely different legal system. Such a system may not recognize some of the legal principles at issue,<sup>85</sup> follow the legal procedures familiar to the parties,<sup>86</sup> or provide similar remedies.<sup>87</sup>

Therefore, whenever it is necessary for a PRC court to adjudicate a case arising out of Hong Kong either because it affects foreign affairs or defense or is an "act of state,"<sup>88</sup> the two legal systems will collide. If the PRC courts or legislature choose to apply PRC legal principles, procedures, and remedies to a Hong Kong case, the integrity of one of the systems will be affected. These decisions by the PRC courts would then become a part of Hong Kong's legal system. Ironically, by allowing

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84. BASIC LAW art. 19.

85. One basic example is the inability of an individual to buy, sell, or lease land in the PRC as all land is state owned. *See* P.R.C. CONST. art. 10. In Hong Kong on the other hand, the citizens currently control the course and use of their property, a right which will expire with any new leases made after 1997. Any lease made in Hong Kong before 1997, but which will expire after 1997, however, will still be valid. As a result, many legal concepts relating to real estate will be completely alien to the PRC court.

An example in the criminal area is that the principle of "double jeopardy" is not applicable in the PRC. The State may appeal the court release of an accused in criminal cases. Since China does not hesitate to arrest Hong Kong residents for crimes committed in the PRC at present, the likelihood of Hong Kong's residents having future encounters with China's criminal system is quite high.

86. One of the most striking contrasts between the two systems is that in China the defense lawyer is primarily responsible to the court and socialist legality, not to the client; their first duty is to the Communist Party. Contrast this to the common law tradition where the primary duty owed by the lawyer is to his or her client.

Also, a person charged with a violent or serious crime can be executed within eight days, including arrest, investigation, prosecution, sentencing, appeal, and execution. *See* SHAO-HUAN LENG & HUNGDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA* (1985). This excessive speed in adjudicating the defendant's guilt and limiting time within which an appeal can be made could severely curtail the very essence of a criminal defendant's right to trial.

87. For instance, PRC courts do not have power to adjudicate based on equitable principles as do the courts of Hong Kong. The PRC courts also lack the power to issue injunctions. Additionally, enforcement of civil judgements and remedies can be a problem because of the low status and lack of political power of the People's courts.

88. BASIC LAW art. 19.

Hong Kong to continue its common law system<sup>89</sup> and preserve its use of case precedents,<sup>90</sup> China has found the perfect means to alter the legal system of Hong Kong.

## B. Economic Interaction

Hong Kong is already one of China's largest trading partners,<sup>91</sup> and China is Hong Kong's largest "foreign investor."<sup>92</sup> As long as Hong Kong remains under British rule, these trades and investments occur on an arms-length basis. Once Hong Kong becomes a part of China, its bargaining power, vis-a-vis the PRC, on such matters may become questionable. After 1997, will Hong Kong be able to advance its own interest? More importantly, how will China react if Hong Kong's interest comes into conflict with China's interest? Currently, Hong Kong is a member of GATT<sup>93</sup> and receives separate Most Favored Nation (MFN)<sup>94</sup> status from many countries around the world. China is not currently a member of GATT,<sup>95</sup> and consequently, enjoys MFN status based only on bilateral treaties.<sup>96</sup> Use of Hong Kong's GATT privileges to tranship PRC-made goods and use of Hong Kong's quota under the

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89. *Id.* art. 8.

90. Although the Joint Declaration states that the Hong Kong courts may "refer to precedents of other *common law jurisdictions*," common law tradition would require a court in Hong Kong to follow the case decisions of the body with final interpretation authority, the National People's Congress. Joint Declaration, Explanatory Note § II (emphasis added).

91. In 1991, the PRC took 27% of Hong Kong exports—many of them parts that are assembled in China and then exported—and a total share in Hong Kong trade of 32.4%. See Sheryl WuDunn, *Hong Kong-China Fence: No Barrier to Commerce*, N.Y. TIMES, Apr. 12, 1992, at A7. Hong Kong does most of its trade with neighboring Guangdong province, taking 80% of Guangdong's exports and providing 80% of the province's imports and foreign investment. See Emily MacFarquhar, *Paving the Way to Prosperity*, U.S. NEWS & WORLD REP., July 6, 1992, at 55.

92. PRC investment in Hong Kong is estimated to be approximately \$US10 billion. See *Reversion of Hong Kong to China: Hearing of the East Asian and Pacific Affairs Subcomm. of the Senate Foreign Relations Comm.*, 102d Cong., 2d Sess. (1992).

93. GATT is an acronym for the General Agreement on Tariffs and Trade, a multilateral trade agreement aimed at expanding international trade and reducing tariff and non-tariff barriers to trade. Currently, 92 countries are Contracting Parties to GATT. The designation "GATT" also refers to the organization headquartered at Geneva through which the General Agreement is negotiated and enforced. Hong Kong joined GATT on April 23, 1986, as a full member.

94. Most-Favored-Nation Treatment is a policy of non-discrimination in trade policy that provides all trading partners the same customs and tariff treatment given to the so-called "Most-Favored-Nation." All GATT members automatically receive MFN treatment from other GATT members under Article I of GATT.

95. China applied for GATT membership in 1986, and is still waiting for approval.

96. See, e.g., Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4652.

Multinational Fiber Arrangement<sup>97</sup> is already a problem.<sup>98</sup> If China's and Hong Kong's interest in trade matters conflict, Hong Kong's interest will probably be subverted because matters of "foreign affairs" are decided by the central government under the Basic Law.

### C. Educational System

Although Articles 136 and 137 of the Basic Law purport to guarantee the status quo of the current educational system in Hong Kong,<sup>99</sup> the impact of the other articles on the system cannot be ignored. An educational system is composed of the institutions, the teachers, the curriculum, and the students. While preserving the institutions, the reversion of Hong Kong to China is already affecting the availability and caliber of teachers and administrators in Hong Kong. Those who have the ability to acquire a passport do so.<sup>100</sup> While it cannot be generalized that such mass emigration necessarily lowers the quality of education, it certainly affects the diversity of the pool and the experience level of the educators.

The material used to educate will most likely change between now and 1997. Anti-communist rhetoric in textbooks, history books that describe the rise of the PRC in unfavorable terms, and textbooks published in Taiwan will probably play increasingly smaller roles in education until they all but disappear.

Students attitudes will most likely change as well. If the perception of the future is that jobs are unlikely to lead to advancement, or that advancement may be more dependant on political connections than on ability, the incentives to succeed are diminished accordingly.<sup>101</sup> As with

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97. The Multi-Fiber Arrangement Regarding International Trade and Textiles (MFA) is an international compact under GATT that allows an importing signatory country to apply quantitative restrictions on textile imports when it considers them necessary to prevent "market disruption." Major importers of textiles, such as the United States and the European Community, may negotiate bilateral agreements or, if necessary, impose restraints on imports from low-wage countries (e.g., Hong Kong and the PRC).

98. The use of Hong Kong's privileges by China, plus a myriad of other international trade violations, has angered the United States to the extent that Foreign Trade representative Carla Hill threatened to impose retaliatory tariffs on up to \$US3.9 billion worth of Chinese exports to the U.S. The U.S. gave a deadline of October 10, 1992, to the PRC to stop the abuse of Hong Kong's privileges. See *Chinese-U.S. Row Threatens Trade as Talks Resume*, AGENCE FRANCE PRESSE, Sept. 11, 1992.

99. BASIC LAW arts. 136-37.

100. See Cait Murphy, *Hong Kong: A Culture of Emigration*, ATLANTIC, Apr., 1991, at 20 and Emily Lau, *Nationality for Sale*, FAR E. ECON. REV., Mar. 15, 1990, at 17.

101. Already, many PRC owned corporations in Hong Kong are staffed by children of high-level party cadre from China. See, e.g., Catherine Sampson, *China's Doors Ever Open for VIP Children*, THE TIMES, Dec. 4, 1990, and Kevin Rafferty, *The Conspiracy to Ruin Hong Kong*, THE INDEPENDENT, Mar. 31, 1991, at 12.

any system, the absence of one major segment will affect the viability of the whole.

## V. CONCLUSION

China's relationship with Hong Kong after 1997 will be much like that of a parent whose child has returned home fully grown and reared by a family with different values and culture. The parent, anxious to incorporate the child into the family, is likely to impose her own standards on the child. Without consideration of the child's past upbringing and by dictating to the child the various rules of the new family, the parent may ultimately destroy the child's independence and the very essence which makes the child unique. These demands for change may well be made with the best of intentions and may appear innocuous. In the case of China vis-a-vis Hong Kong, a seemingly simple change of the name of Queen's Boulevard to Peoples Boulevard can have consequences, including the need for changes in the postal services, bus schedules, and reprinting of maps, which have a rippling effect ultimately far greater than that contemplated by the original action. Acts more significant than the changing of a street name may take the form of government interference in the market system to aid PRC interest in Hong Kong, government censorship of educational materials, or ultraconservative fiscal policies at the cost of the social programs. All of these acts, individually and collectively, could undermine the integrity of Hong Kong's existing system.

Few doubt the sincerity of the Chinese government's desire to maintain the economic posterity of Hong Kong. However, if the Chinese government insists upon imposing its will on Hong Kong through the issuance of threats rather than persuasion, its actions in Hong Kong may trigger such loss of confidence by the people of Hong Kong as well as foreign investors that there will be insufficient bases of talent, capital, and infrastructure left to maintain prosperity even before 1997. Unless the Chinese government learns to handle this returning child with a gentle hand of guidance rather than a firm hand of discipline, it may find that, by 1997, the returning child is justifiably rebellious.